

Opinion No. 68-93

September 10, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Richard Baumgartner Attorney Employment Security Commission of New Mexico
P.O. Box 1928 Albuquerque, New Mexico 87103

QUESTION

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May employees of the Employment Security Commission be reimbursed travel expenses in advance if such reimbursement is paid out of the Employment Security Commission Fund?

CONCLUSION

No.

OPINION

{*146} **ANALYSIS**

Section 11-1-9 D, N.M.S.A., 1953 Compilation prohibits advance payment to public officers or employees for travel expenses as follows:

"D. Public funds shall not be advanced to any public officer or employee for expenses of travel within or without the state before the actual time such travel is performed, and payment shall be made only upon sworn vouchers duly presented with any required receipts attached thereto."

The question presented to this office is whether or not the Employment Security Commission Fund is to be classified as "public funds".

In Attorney General Opinion No. 67-128, issued October 31, 1967, this office said that:

"Although many definitions of the term 'public moneys' may be found, the generally accepted concept is described by the Court in **Storen v. Sexton**, 209 Ind. 589, 200 N.E. 251 as:

' . . . all funds impressed with a public interest that is, funds raised by general taxation, or special levies upon special assessment districts, or the income from publicly owned properties, **or funds arising from private sources in the hands of public officers which are designed for public use.** . . ." (Emphasis added).

The Employment Security Commission Fund was created by Section 59-9-13 (b), N.M.S.A., 1953 Compilation as follows:

"There is hereby created a special fund, separate and apart from the unemployment compensation administration fund provided by subsection (a) of this section, to be held in the custody of the state treasurer, to be known as the Employment Security Commission Fund. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the commission, and any balance in the fund shall not lapse at any time but shall be continuously available to the commission for expenditure consistent with this act."

Since the Employment Security Commission Fund is held in the hands of public officers and is designed for public use, we must conclude that money held in this fund by the State Treasurer is public money and subject to Section 11-1-9 D, supra.

We believe that it should be pointed out that it is a fourth degree felony to either pay or receive public money for services not yet rendered. See Section 40A-23-2, N.M.S.A., 1953 Compilation. It is our opinion that prepayment of travel expenses to public employees may constitute a violation of this Section of our Criminal Code.

By: Gary O'Dowd

Assistant Attorney General